

Buerger Declaration Exhibit 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KALOMA CARDWELL,)
Plaintiff,)
vs.) 19 Civ. 10256
) (GHW)
DAVIS POLK & WARDWELL,)
THOMAS REID, JOHN BICK,)
WILLIAM CHUDD, SOPHIA)
HUDSON, HAROLD)
BIRNBAUM, DANIEL BRASS,)
BRIAN WOLFE, and JOHN)
BUTLER,)
Defendants.)
_____)

REMOTE DEPOSITION OF
HAROLD BIRNBAUM
located in New York, New York
Monday, April 12, 2021

(Transcript contains Confidential, Highly
Confidential and Attorneys' eyes only
portions - confidentiality designations
legend at back of transcript)

Reported By:
CATHI IRISH, RPR, CRR, CLVS

<p style="text-align: right;">Page 2</p> <p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8 April 12, 2021</p> <p>9 9:35 a.m.</p> <p>10</p> <p>11 Remote deposition of HAROLD</p> <p>12 BIRNBAUM, with all participants</p> <p>13 appearing via videoconference, before</p> <p>14 Cathi Irish, a Registered Professional</p> <p>15 Reporter, Certified Realtime Reporter,</p> <p>16 and Notary Public of the State of</p> <p>17 New York.</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 4</p> <p>1</p> <p>2 HAROLD BIRNBAUM, called</p> <p>3 as a witness, having been duly sworn</p> <p>4 by a Notary Public, was examined and</p> <p>5 testified as follows:</p> <p>6 EXAMINATION</p> <p>7 BY MR. JEFFRIES:</p> <p>8 Q. Good morning, Mr. Birnbaum.</p> <p>9 A. Good morning, Mr. Jefferies.</p> <p>10 Q. I'm going to be asking you a few</p> <p>11 questions and throughout the course of the</p> <p>12 deposition I'm going to ask the following,</p> <p>13 that you answer all questions verbally.</p> <p>14 Do you understand that, sir?</p> <p>15 A. Yes.</p> <p>16 Q. That if there's an opportunity or</p> <p>17 time during which you require a moment to</p> <p>18 speak to your attorney that you ask to do</p> <p>19 so. However, I will indicate now that if</p> <p>20 there's a question pending, I would ask</p> <p>21 that any conversation with your attorney</p> <p>22 take place after the question has been</p> <p>23 answered.</p> <p>24 Do you understand that, sir?</p> <p>25 A. I understand.</p>
<p style="text-align: right;">Page 3</p> <p>1</p> <p>2 A P P E A R A N C E S:</p> <p>3</p> <p>4 JEFFRIES LAW</p> <p>5 Attorneys for Plaintiff</p> <p>6 1345 Avenue of the Americas</p> <p>7 New York, New York 10019</p> <p>8 BY: DAVID JEFFRIES, ESQ.</p> <p>9</p> <p>10 PAUL, WEISS, RIFKIND, WHARTON</p> <p>11 & GARRISON</p> <p>12 Attorneys for Defendants</p> <p>13 1285 Avenue of the Americas</p> <p>14 New York, New York 10019</p> <p>15 BY: BRUCE BIRENBOIM, ESQ.</p> <p>16 SONDRAPORTA, ESQ.</p> <p>17</p> <p>18 ALSO PRESENT:</p> <p>19 ZACH CZERENDA, Veritext concierge</p> <p>20 KALOMA CARDWELL</p> <p>21 MICHAEL FLYNN</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 5</p> <p>1 BIRNBAUM</p> <p>2 Q. I'm also going to indicate to you</p> <p>3 that if you don't understand a question</p> <p>4 that I ask that you ask me to rephrase it</p> <p>5 or indicate that there's a lack of</p> <p>6 understanding because if you answer the</p> <p>7 question, I'm going to be assuming that</p> <p>8 you understood it in its totality.</p> <p>9 Do you understand that, sir?</p> <p>10 A. Yes, I do.</p> <p>11 Q. Mr. Birnbaum, have you ever been</p> <p>12 deposed before?</p> <p>13 A. No.</p> <p>14 Q. Have you ever been a plaintiff or</p> <p>15 defendant in any other lawsuit aside from</p> <p>16 this one?</p> <p>17 A. No, I have not.</p> <p>18 Q. Have you ever been arrested or</p> <p>19 convicted of a crime?</p> <p>20 A. No.</p> <p>21 Q. Are you taking any medication or</p> <p>22 under the influence of any substance that</p> <p>23 affects your memory or your ability to</p> <p>24 testify truthfully and accurately today?</p> <p>25 A. No, I'm not.</p>

<p style="text-align: right;">Page 54</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 of billable hours for a full-time</p> <p>3 associate in a year? Yes, there can</p> <p>4 be lots of reasons for that, including</p> <p>5 performance issues, sort of the most</p> <p>6 likely one that comes to mind when you</p> <p>7 put the hypothetical to me.</p> <p>8 BY MR. JEFFRIES:</p> <p>9 Q. But the answer is yes, it would</p> <p>10 catch your attention; correct?</p> <p>11 MR. BIRENBOIM: Objection,</p> <p>12 mischaracterizes the witness's</p> <p>13 testimony.</p> <p>14 BY MR. JEFFRIES:</p> <p>15 Q. You can answer, Mr. Birnbaum.</p> <p>16 A. My answer is as I said.</p> <p>17 Q. Did Davis Polk utilize a weekly</p> <p>18 capacity form or system to track</p> <p>19 associates' matters and availability</p> <p>20 during 2014 to 2018?</p> <p>21 A. So I can answer as to the M&A</p> <p>22 group and the answer was yes, in that time</p> <p>23 frame, I believe we did.</p> <p>24 Q. Please describe Davis Polk's</p> <p>25 weekly capacity forms -- and first, we can</p>	<p style="text-align: right;">Page 56</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 associate expected to have going forward</p> <p>3 to take on new work. And we would</p> <p>4 receive, I believe it was a weekly e-mail</p> <p>5 and we would refer to that for purposes of</p> <p>6 making staffing decisions over the coming</p> <p>7 week until we got the next report.</p> <p>8 MR. JEFFRIES: I'm going to ask</p> <p>9 that tab 2 be moved in as Exhibit 2 at</p> <p>10 this point in time.</p> <p>11 (Exhibit 2, document Bates</p> <p>12 labeled DPW_SDNY-000046578, marked for</p> <p>13 identification.)</p> <p>14 VERITEXT CONCIERGE: Exhibit 2</p> <p>15 has been introduced. I'm pulling up</p> <p>16 the screen share now.</p> <p>17 BY MR. JEFFRIES:</p> <p>18 Q. At the bottom of the page, do you</p> <p>19 see the e-mail from Mr. Cardwell to</p> <p>20 Ms. Carolina Fenner on February 2, 2017 at</p> <p>21 11:04 a.m.?</p> <p>22 A. I'm going to need a minute to</p> <p>23 just blow this up a little bit and review</p> <p>24 it so hold on one second.</p> <p>25 Q. So again I'm orienting you to --</p>
<p style="text-align: right;">Page 55</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 take this down? We can take Exhibit 1</p> <p>3 down, thank you.</p> <p>4 Mr. Birnbaum, please describe</p> <p>5 Davis Polk's weekly capacity forms and</p> <p>6 walk me through how the firm used the</p> <p>7 forms to track associates' availability to</p> <p>8 take on new work.</p> <p>9 A. Okay, now through this period I</p> <p>10 was an associate for about half and</p> <p>11 staffing partner for about half. Are we</p> <p>12 focused on a particular part of this</p> <p>13 period?</p> <p>14 Q. Yes, I'm focused on the part when</p> <p>15 you were a staffing partner.</p> <p>16 A. Okay. So the use of these</p> <p>17 reports was as follows. As a staffing</p> <p>18 partner, I would receive -- my fellow</p> <p>19 co-staffing partner and I would receive, I</p> <p>20 believe it was a weekly report that</p> <p>21 indicated for each associate who was our</p> <p>22 responsibility to staff, it would indicate</p> <p>23 I believe the recent hours over a recent</p> <p>24 historical period for each associate and</p> <p>25 an indication of how much capacity that</p>	<p style="text-align: right;">Page 57</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 A. Yes sorry. I just need a minute.</p> <p>3 Q. Okay. It's just one line.</p> <p>4 A. I just want to make sure I have</p> <p>5 the context, that's all.</p> <p>6 Q. I'm going to point you to a part</p> <p>7 in this document.</p> <p>8 A. I'm sorry, can I let you know</p> <p>9 when I'm ready to proceed?</p> <p>10 Q. I'm not asking you to read the</p> <p>11 entire document, Mr. Birnbaum, so I'm</p> <p>12 going to ask that you orient your focus,</p> <p>13 your attention to the parts I'm speaking</p> <p>14 to you about.</p> <p>15 The first is at this point in</p> <p>16 time I'm asking that you look at the</p> <p>17 message from Mr. Cardwell to Ms. Fenner --</p> <p>18 A. I'm sorry, I need to read the</p> <p>19 whole e-mail to understand the context.</p> <p>20 That is important to me in how I answer,</p> <p>21 so if you could bear with me, that would</p> <p>22 be great.</p> <p>23 Q. I'm just going to remind you for</p> <p>24 purposes of your answer, I'm teeing up the</p> <p>25 area that should be informing your</p>

<p style="text-align: right;">Page 58</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 answers, not the rest of the document but</p> <p>3 the part that I'm teeing you to.</p> <p>4 MR. BIRENBOIM: The witness is</p> <p>5 entitled to read as much of the</p> <p>6 document as he wishes to put the</p> <p>7 document in context.</p> <p>8 BY MR. JEFFRIES:</p> <p>9 Q. I'm going to again ask for your</p> <p>10 specific attention to where I've pointed</p> <p>11 your attention.</p> <p>12 A. Okay, I'll let you know when I'm</p> <p>13 ready.</p> <p>14 Okay, I'm ready.</p> <p>15 Q. So you see where Mr. Cardwell</p> <p>16 stated, just to confirm when a staffing</p> <p>17 request is made, you determine which</p> <p>18 associates could be, and ultimately are,</p> <p>19 asked to work on matters, correct, you saw</p> <p>20 that; right?</p> <p>21 A. Where is that?</p> <p>22 Q. You spent five minutes reading</p> <p>23 the document.</p> <p>24 A. I'm sorry, could you just point</p> <p>25 me to where it is so I have it in front of</p>	<p style="text-align: right;">Page 60</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 stated to Ms. Fenner in this e-mail sent</p> <p>3 on February 2, 2017 at 11:32 a.m., this is</p> <p>4 the first time than anyone has told me</p> <p>5 that that you're no longer responsible for</p> <p>6 my staffing me. That raises two</p> <p>7 questions. One, who is the primary</p> <p>8 persons responsible for staffing me; and</p> <p>9 two, who receives my weekly capacity</p> <p>10 upload form?</p> <p>11 Do you see that?</p> <p>12 A. I do.</p> <p>13 Q. Do you see where Ms. Fenner's</p> <p>14 e-mail sent to Mr. Cardwell on February 2,</p> <p>15 2017 at 11:50 a.m., do you see that?</p> <p>16 A. Yes.</p> <p>17 Q. And do you see that Ms. Fenner in</p> <p>18 the e-mail states the staffing partners</p> <p>19 are currently -- the staffing partners</p> <p>20 currently Brian Wolfe and Harold Birnbaum</p> <p>21 handle staffing for third years and more</p> <p>22 senior. Automatic e-mail comes from the</p> <p>23 system as me every Tuesday. Christine</p> <p>24 puts all updates together in one chart</p> <p>25 which gets sent to the staffing partners</p>
<p style="text-align: right;">Page 59</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 me when I answer the question?</p> <p>3 Q. Yes, it's at the bottom of the</p> <p>4 page, it is --</p> <p>5 A. Here (indicating)?</p> <p>6 Q. Yes, the message from</p> <p>7 Mr. Cardwell to --</p> <p>8 A. Yes, I see that.</p> <p>9 Q. And carrying forward, do you see</p> <p>10 where Ms. Fenner responded in her e-mail</p> <p>11 sent on February 2, 2017 at 11:24 a.m. by</p> <p>12 telling Mr. Cardwell, your class is no</p> <p>13 longer in my staffing territory. I only</p> <p>14 staff on first and second year but I saw</p> <p>15 on Christine's chart that you have 100</p> <p>16 percent capacity and I knew that lawyer</p> <p>17 was very busy so I asked her if there was</p> <p>18 any project that she could use your help</p> <p>19 with. She said she would love to have</p> <p>20 your help with that specific one but that</p> <p>21 she would keep you in mind for deal work</p> <p>22 as well.</p> <p>23 Do you see that?</p> <p>24 A. I do.</p> <p>25 Q. Do you see where Mr. Cardwell</p>	<p style="text-align: right;">Page 61</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 and me.</p> <p>3 Do you see that?</p> <p>4 A. I do.</p> <p>5 REDACTED</p> <p>6 REDACTED</p> <p>7 REDACTED</p> <p>8 REDACTED</p> <p>9 REDACTED</p> <p>10 REDACTED</p> <p>11 Q. Do you know when Mr. Cardwell</p> <p>12 became a third year associate?</p> <p>13 A. I do not.</p> <p>14 Q. Would you dispute it if I said it</p> <p>15 was in September of 2016?</p> <p>16 A. If he started at the firm in the</p> <p>17 fall of 2014, he would have been at the</p> <p>18 firm for two full years by the fall of</p> <p>19 2016 and at that point in time often would</p> <p>20 have been referred to as a third year</p> <p>21 associate, two full years under his belt</p> <p>22 arising a third year. Terminology varies,</p> <p>23 sometimes it's not until later in that</p> <p>24 third year but that's the earliest he</p> <p>25 would have been considered a third year</p>

16 (Pages 58 - 61)

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2 been introduced. I'm pulling it up

3 now.

4 BY MR. JEFFRIES:

5 Q. And so do you see the e-mail from

6 Ms. Fenner to yourself and Brian Wolfe

7 sent on December 27, 2016?

8 A. Yeah, I do. Let me just read

9 this whole document here.

10 Okay, yes, I see it.

11 Q. Do you see the subject line says

12 December 27, capacity update?

13 A. I do.

14 Q. This e-mail lists capacity

15 updates for M&A associates across five

16 different classes of associates; correct?

17 A. Yeah, I don't remember this

18 e-mail but this looks like Carolina's sort

19 of staffing capacity report when the

20 regular format wasn't available for

21 whatever reason so yes, this looks like

22 her capacity report for this date.

23 Q. Isn't it true that Cardwell is

24 the only associate on the list in this

25 e-mail who had 100 percent of his time

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2 free and available to take on new work?

3 MR. BIRENBOIM: Objection, the

4 document speaks for itself. You can

5 answer.

6 THE WITNESS: Yes, he's the only

7 associate on this list with 100

8 percent next to his name.

9 BY MR. JEFFRIES:

10 Q. Isn't it also true with the

11 exception of one other associate,

12 Mr. Cardwell is the only Black associate

13 listed in this e-mail?

14 A. Let me just look and see if I can

15 remember here. Let me just for my own

16 purposes, so -- I'm sort of -- I think I

17 know what each of these people identified

18 themselves as but [REDACTED] and [REDACTED] were

19 white. [REDACTED] was Indian or I think

20 Pakistani. [REDACTED] was white. [REDACTED] was

21 of Asian descent, [REDACTED] was white. [REDACTED] I

22 think was Persian. [REDACTED] was white.

23 Mr. Cardwell was Black, [REDACTED] and [REDACTED]

24 were white. [REDACTED] was Black. [REDACTED] was

25 white. [REDACTED] white. [REDACTED] was I think

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2 Indian. And [REDACTED] was white.

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 Q. Do you see the part in

7 Ms. Fenner's e-mail where she told you and

8 Brian Wolfe, would be great if we could

9 give Cardwell something?

10 A. I see that, yes.

11 Q. So Mr. Birnbaum, at the time you

12 received Ms. Fenner's December 27th

13 e-mail, had you noticed that she had sent

14 you three e-mails over the prior two

15 months where she explicitly told you it

16 would be great if we could give Cardwell

17 something?

18 A. I don't. I don't remember but I

19 will say there were periods when I was

20 aware that he had quite a bit of capacity.

21 I was doing everything I could to staff

22 him but his performance issues made it

23 very, very difficult to do that.

24 MR. JEFFRIES: I'm going to ask

25 that the question be marked to be

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2 stricken after the portion of the

3 answer in which the witness answered

4 affirmatively as to having received

5 the messages from Ms. Fenner.

6 BY MR. JEFFRIES:

7 Q. At the time, okay, at the time

8 you got this message, you understood that

9 the word something meant staffing

10 assignment; right? She's asking about

11 giving --

12 A. That's how I interpret it now.

13 Again, I don't remember any of this but

14 looking at the e-mail now, that's how I

15 interpret it, yes.

16 Q. And at this time you understood

17 that Carolina Fenner was a staffing

18 coordinator for the firm's most junior M&A

19 associates; right?

20 A. Yes.

21 Q. At the time you understood that

22 Ms. Fenner, a manager in the associate

23 development department, was familiar with

24 all of Mr. Cardwell's performance reviews;

25 right?

<p style="text-align: right;">Page 90</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 A. So I don't know if she was a</p> <p>3 manager. I don't know if that was her</p> <p>4 title, I don't recall, and I don't know</p> <p>5 that she was familiar with all the</p> <p>6 performance reviews. She may have been</p> <p>7 but I don't know.</p> <p>8 Q. Isn't it true that at the time</p> <p>9 Carolina Fenner was both concerned and</p> <p>10 confused as to why neither you nor Wolfe</p> <p>11 would staff Mr. Cardwell during the period</p> <p>12 of October 2016 through March 2017?</p> <p>13 A. There are a number of problems</p> <p>14 with that question. First of all, I don't</p> <p>15 think that's what Carolina thought.</p> <p>16 Second of all, we didn't refuse to staff</p> <p>17 him on anything. We were trying as best</p> <p>18 we could to staff him on deals that he</p> <p>19 could handle. The problem was he was a</p> <p>20 very poor performer and it was difficult</p> <p>21 due to his performance issue to staff him</p> <p>22 on deals. We were doing our best.</p> <p>23 Q. During the period of October 2016</p> <p>24 through March of 2017, you staffed</p> <p>25 Mr. Cardwell differently than the firm's</p>	<p style="text-align: right;">Page 92</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 not sure.</p> <p>3 Q. When you say co-head of the</p> <p>4 group, do you mean co-head of the M&A</p> <p>5 group; correct?</p> <p>6 A. I do.</p> <p>7 Q. The same group Mr. Cardwell was</p> <p>8 in at that time; correct?</p> <p>9 A. Yes.</p> <p>10 Q. And so as co-head of the group,</p> <p>11 did he have any say so in staffing?</p> <p>12 A. Not really. I mean staffing was</p> <p>13 the responsibility of the staffing</p> <p>14 partners. As co-head was he, you know,</p> <p>15 did he have input, you know, from time to</p> <p>16 time, maybe. He may have but in general,</p> <p>17 that was not his day-to-day responsibility</p> <p>18 as I recall.</p> <p>19 Q. I'm not asking about day-to-day</p> <p>20 responsibilities, just whether or not as</p> <p>21 the co-head of the group, he had input in</p> <p>22 staffing.</p> <p>23 A. He may have. I don't recall.</p> <p>24 Again I don't recall the specific staffing</p> <p>25 instances. I had quite a lot of these</p>
<p style="text-align: right;">Page 91</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 white M&A associates, didn't you?</p> <p>3 A. No, and I don't know what you're</p> <p>4 talking about.</p> <p>5 Q. Did Mr. Cardwell's race in any</p> <p>6 way contribute to you staffing</p> <p>7 Mr. Cardwell differently than the firm's</p> <p>8 white M&A associates?</p> <p>9 A. Not at all.</p> <p>10 Q. Are you sure?</p> <p>11 A. Yes.</p> <p>12 Q. From October 2016 through March</p> <p>13 2017, John Bick knew that Mr. Cardwell was</p> <p>14 not being staffed on billable matters,</p> <p>15 didn't he?</p> <p>16 A. I don't know.</p> <p>17 MR. BIRENBOIM: No foundation.</p> <p>18 BY MR. JEFFRIES:</p> <p>19 Q. During the period of October 2016</p> <p>20 through March 2017, what was John Bick's</p> <p>21 nexus to the M&A department?</p> <p>22 A. He would have -- he would have</p> <p>23 been -- he was a partner in the group.</p> <p>24 Beyond that, I think he may have been</p> <p>25 co-head of the group at the time but I'm</p>	<p style="text-align: right;">Page 93</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 conversations at the time.</p> <p>3 Q. Did he care whether associates</p> <p>4 were billing, did he care whether</p> <p>5 associates within the M&A group were</p> <p>6 billing or not?</p> <p>7 MR. BIRENBOIM: Objection, no</p> <p>8 foundation.</p> <p>9 MR. JEFFRIES: You can answer,</p> <p>10 Mr. Birnbaum.</p> <p>11 MR. BIRENBOIM: If you have a</p> <p>12 basis to answer what he thought, you</p> <p>13 can answer.</p> <p>14 THE WITNESS: I don't know what</p> <p>15 was in his head. I think we all cared</p> <p>16 and wanted to see associates billing,</p> <p>17 both for their own development and</p> <p>18 for -- and to generate revenue and so</p> <p>19 on but I don't know anything specific</p> <p>20 to how Mr. Bick thought about it.</p> <p>21 BY MR. JEFFRIES:</p> <p>22 Q. During the period of October</p> <p>23 2016 -- wait, so your testimony is that as</p> <p>24 a partner and as a staffing partner, you</p> <p>25 can't give an opinion as to whether or not</p>

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2 the co-head of the M&A group would want

3 his associates billing or not?

4 MR. BIRENBOIM: Objection, no

5 foundation for knowing what's in his

6 head. You can answer.

7 THE WITNESS: It's all the same.

8 I don't know what was in John's head.

9 I don't know what was in -- we didn't

10 discuss it so I can't tell you that.

11 I assume as an M&A partner he would

12 want them working both for their own

13 career development and for revenue

14 generating purposes. That would be my

15 expectation. I just don't know what

16 was in Mr. Bick's head.

17 BY MR. JEFFRIES:

18 REDACTED

19 REDACTED

20 REDACTED

21 REDACTED

22 REDACTED

23 REDACTED

24 REDACTED

25 REDACTED

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2 REDACTED

3 REDACTED

4 REDACTED the period of October 2016

5 through March 2017, did Mr. Bick say

6 anything to you that led you to not staff

7 Mr. Cardwell?

8 A. No, not that I recall.

9 Q. During the period of October 2016

10 through March 2017, did any other Davis

11 Polk partner directly tell you not to

12 staff Mr. Cardwell?

13 A. No, not that I recall.

14 Q. So is it possible, you indicated

15 you can't recall, is it possible that such

16 thing occurred?

17 A. No. I can't really imagine.

18 Q. So you've indicated you can't

19 recall and you can't imagine. I'm asking

20 you for a yes or no answer with respect to

21 whether or not between October 2016 and

22 March 2017 you as the staffing coordinator

23 were told by any other Davis Polk partners

24 directly not to staff Mr. Cardwell, is

25 your answer yes or no?

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2 A. No.

3 REDACTED

4 REDACTED

5 REDACTED

6 REDACTED

7 REDACTED

8 REDACTED

9 REDACTED

10 REDACTED

11 REDACTED

12 REDACTED

13 REDACTED

14 REDACTED

15 REDACTED

16 REDACTED

17 REDACTED

18 Q. So you made a decision not to

19 staff an associate for an extended period

20 of time based off of opinions given by

21 other partners but you don't remember any

22 of their names?

23 MR. BIRENBOIM: Objection,

24 completely mischaracterizes the

25 testimony. You may answer.

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2 BY MR. JEFFRIES:

3 Q. What are their names?

4 A. Look, that's not what I said and

5 let me explain. Look, the staffing

6 process involves partners coming to

7 staffing partners with a deal and the

8 staffing partners proposing an associate

9 and there's often a bit of a negotiation

10 around that because the partner whose deal

11 it is wants the best associate they can

12 get and they may or may not be available,

13 it's a bit of a back and forth. I could

14 never unilaterally impose an associate on

15 a partner, it just didn't work like that

16 so this was routine. This happened just

17 like I said multiple times a day so no, I

18 don't remember the specifics or the

19 partners or the deals but I can tell you

20 it was very hard to staff Mr. Cardwell

21 because of his performance issues.

22 Q. So you're saying it happened a

23 lot from a lot of different partners but

24 as you sit here today, you can't give me

25 the names of a single partner or a single

[illegible]

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1 BIRNBAUM - CONFIDENTIAL
2 REDACTED
3
4 BY MR. JEFFRIES:
5 Q. Your testimony if I'm clear is
6 also that you don't remember the names of
7 any people aside from Mr. Wolfe who was
8 your fellow staffing coordinator that had
9 given you this type of feedback about
10 Mr. Cardwell. Isn't that what you also
11 testified? You don't remember the names
12 of these people?
13 MR. BIRENBOIM: Objection to
14 form.
15 MR. JEFFRIES: Correct?
16 MR. BIRENBOIM: Objection to
17 form. You can answer.
18 THE WITNESS: As I explained, I
19 had so many staffing conversations
20 about Mr. Cardwell and other
21 associates with my fellow partners
22 through this period, I don't remember
23 the specifics at this point. What I
24 remember is a very strong and clear
25 general impression that he was a very

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1 BIRNBAUM - CONFIDENTIAL
2 poor performer and had very serious
3 performance issues.
4 BY MR. JEFFRIES:
5 Q. Which led to him not being
6 staffed for six months; correct?
7 MR. BIRENBOIM: Objection to
8 form.
9 THE WITNESS: I don't know what
10 period you're talking about or if he
11 was --
12 BY MR. JEFFRIES:
13 Q. We're talking about the period,
14 Mr. Birnbaum, the same period we've been
15 talking about for the past 15 minutes,
16 October 2016 through March 2017. Sounds
17 like you're saying that his performance
18 was so bad that you couldn't staff him for
19 six months; is that correct?
20 REDACTED
21
22
23 I think he had matters
24 throughout that period of time so we were
25 sometimes able to succeed but it was very,

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1 BIRNBAUM - CONFIDENTIAL
2 very difficult.
3 MR. JEFFRIES: Okay. I'd like to
4 introduce Exhibit 7, tab 7 at this
5 point in time.
6 (Exhibit 7, document Bates
7 labeled DPW_SDNY-000086138, marked for
8 identification.)
9 BY MR. JEFFRIES:
10 Q. So at the very bottom of the
11 page, do you see the e-mail from you to
12 Mr. Cardwell sent on August 31, 2017 at
13 5:04 p.m.?
14 A. Give me a minute here.
15 (Witness perusing document.)
16 Okay, the e-mail at the bottom of
17 this chain?
18 Q. Yes.
19 A. I see an e-mail there.
20 Q. And you see that the subject of
21 the e-mail is pitch; right?
22 A. I see -- I see the subject of the
23 next e-mail up is pitch. I can't tell if
24 it was the same subject.
25 Q. Do you see that your e-mail

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1 BIRNBAUM - CONFIDENTIAL
2 stated, "Kaloma, we're pitching for a new
3 client, couple of public company deals,
4 and would like to include you on the team
5 for the pitch. Nothing to do right now,
6 just wanted to give you a heads up. Who
7 knows if we'll get it, but here's hoping.
8 Sounds like it wouldn't start until mid
9 September, FYI."
10 Is that what -- you'd agree
11 that's what the e-mail reads?
12 A. Yes, that's what the words say.
13 Q. Your words, your words, right,
14 your e-mail, your words?
15 A. Yes, it looks like it was an
16 e-mail from me.
17 Q. Before you sent this e-mail, did
18 anyone else besides yourself, Daniel Brass
19 and Leonard Kreynin -- Len Kreynin, know
20 that Mr. Cardwell would be on the team for
21 the pitch?
22 A. I don't think so.
23 Q. Well, did Louis Goldberg know?
24 A. I don't recall that.
25 Q. Do you know if John Bick knew?

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1 BIRNBAUM - CONFIDENTIAL

2 A. I don't recall that.

3 Q. Do you know if Thomas Reid knew?

4 A. I don't recall that.

5 Q. Do you know if William Aaronson

6 knew?

7 A. No, I don't recall that.

8 Q. Was this pitch important to the

9 firm's M&A group?

10 A. I really don't remember any of

11 the details about it for the reasons that

12 we've discussed.

13 Q. Which reasons are those?

14 A. You know, this was a long time

15 ago and I handle a lot of these staffing

16 requests. There could have been five

17 pitches that week, I just don't remember

18 the details.

19 Q. Did the M&A group see this pitch

20 as an opportunity to build a long-term

21 relationship with a potential client?

22 A. I just -- I don't remember the

23 pitch. I mean I don't remember who it was

24 to, I just don't remember any of the

25 details. At some level every pitch is

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1 BIRNBAUM - CONFIDENTIAL

2 important and an opportunity but I don't

3 remember any details about this so I

4 couldn't tell you.

5 Q. You would agree that the firm

6 puts its best foot forward in an attempt

7 to secure a potential client; right?

8 A. Pitches are important.

9 Q. And so in keeping with my

10 question, would you agree that the firm

11 puts its best foot forward in this

12 attempting to secure business from a

13 potential client like in a pitch?

14 A. Pitches were certainly looking to

15 impress clients and we're look certainly

16 looking to do that however we can.

17 Staffing pitches like staffing anything

18 else is subject to availability, subject

19 to competing demands on people's times,

20 you know, do we always put the best

21 partner forward, we put a great team

22 forward for sure but that's how pitches

23 work.

24 Q. Do you see that within a minute

25 of -- as you look through the e-mail

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1 BIRNBAUM - CONFIDENTIAL

2 chain, you can see there's a response from

3 Mr. Cardwell; correct?

4 A. On the Friday, September 1,

5 10:12 a.m. response?

6 Q. Yes.

7 A. I do see that.

8 Q. So do you see that within a

9 minute of Mr. Cardwell having replied to

10 your e-mail, you forward Mr. Cardwell's

11 e-mail to the M&A partner Lynn Kreynin and

12 said, "See below, have no heard back from

13 Kaloma."

14 Does it mean that you have now

15 heard back from Kaloma?

16 A. I don't remember what I meant but

17 looking at it now, that's what I think I

18 probably meant, yes, and this was -- this

19 was pretty standard practice. I mean when

20 we have an assignment to fill, we talk to

21 the partner about who could do it,

22 identify an associate, reach out to the

23 associate and once the associate confirmed

24 availability, we confirm to the partner

25 that they are on board so that's what I

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1 BIRNBAUM - CONFIDENTIAL

2 was doing here.

3 REDACTED

4 REDACTED

5 REDACTED

6 REDACTED

7 REDACTED

8 REDACTED

9 REDACTED

10 REDACTED

11 REDACTED

12 REDACTED

13 REDACTED

14 REDACTED

15 REDACTED

16 REDACTED

17 REDACTED

18 REDACTED

19 A. I didn't, I didn't know it then,

20 no.

21 Q. In this instance, with respect to

22 the pitch that we're talking about right

23 now, did the company ask Davis Polk to put

24 together a proposal?

25 A. Sorry, I just don't remember any

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1 BIRNBAUM - CONFIDENTIAL

2 not answered.

3 MR. BIRENBOIM: If his answer is

4 he doesn't recall the policy, that's

5 his answer.

6 MR. JEFFRIES: This is not an

7 answer about policy, this is his

8 understanding of retaliation within

9 the workplace setting at Davis Polk in

10 which he is a partner.

11 MR. BIRENBOIM: No, you connected

12 it to the Davis Polk policy. Go back

13 and read your question.

14 BY MR. JEFFRIES:

15 Q. What's your understanding of

16 retaliation, Mr. Birnbaum?

17 A. Just in general terms, it's

18 taking -- it's taking some action against

19 someone to punish them for something they

20 did.

21 Q. What about discrimination?

22 A. It's treating someone differently

23 for some perceived way in which they are

24 different.

25 Q. What about harassment?

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1 BIRNBAUM - CONFIDENTIAL

2 A. It's acting in a way that's

3 offensive or makes someone uncomfortable

4 in some way.

5 MR. JEFFRIES: Counsel.

6 MR. BIRENBOIM: Yes, sir.

7 MR. JEFFRIES: I need to make a

8 call to the court. I would like to

9 propose a 30-minute break at this

10 time. Is that acceptable?

11 MR. BIRENBOIM: A call to the

12 court in this case?

13 MR. JEFFRIES: No, no.

14 MR. BIRENBOIM: Yes, we can break

15 for lunch.

16 MR. JEFFRIES: Let's do a

17 30-minute lunch break.

18 MR. BIRENBOIM: 2 o'clock?

19 MR. JEFFRIES: Let's do 2:05.

20 MR. BIRENBOIM: Okay.

21 (Lunch recess taken at 1:37 p.m.)

22

23

24

25

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1 BIRNBAUM

2 AFTERNOON SESSION

3 (Time noted: 1:50 p.m.)

4 HAROLD BIRNBAUM, resumed

5 and testified as follows:

6 CONTINUED EXAMINATION

7 BY MR. JEFFRIES:

8 Q. Mr. Birnbaum, I'm just going to

9 remind you you're still under oath from

10 earlier today. Do you recall?

11 A. Yes.

12 MR. JEFFRIES: I'm going to ask

13 that tab 10 be moved into evidence.

14 VERITEXT CONCIERGE: Tab 10 has

15 been introduced and I'm pulling it up

16 now.

17 BY MR. JEFFRIES:

18 Q. Mr. Birnbaum, do you see the

19 e-mail -- do you see what's on your screen

20 right now?

21 A. I do. Let me zoom in here.

22 Q. And it's an e-mail; correct?

23 A. Yes, looks like an e-mail.

24 Q. Do you see --

25 A. Sorry, just give me one second to

Page 173

1 BIRNBAUM - HIGHLY CONFIDENTIAL

2 read this if you would. (Witness perusing

3 document.)

4 Okay.

5 Q. Do you see that's an e-mail from

6 Rocio Clausen to Mr. Cardwell and that

7 Carolina Fenner is also copied on that

8 e-mail; correct?

9 A. I see that from the e-mail, yes.

10 Q. The date is September 8, 2016;

11 right?

12 A. Yes.

13 Q. Do you see where the e-mail

14 states I hope you are well, would you be

15 able to assist the credit group (mainly JW

16 Perry and Frank Manley) with some KYC,

17 organizational materials, resolutions,

18 certificates, et cetera for a tailwind

19 deal closing later this month?

20 Do you see that?

21 A. Yes.

22 Q. On or around September or October

23 of 2016, were you aware that Clausen or

24 Fenner had reached out to Mr. Cardwell and

25 attempted to staff him on a credit

Page 174

1 BIRNBAUM - HIGHLY CONFIDENTIAL

2 assignment?

3 A. I don't know. I may have been, I

4 don't recall.

5 Q. If you were aware, how would you

6 have gained that knowledge?

7 A. I don't know. I mean maybe

8 Carolina would have mentioned it to me or

9 asked me. I don't know.

10 Q. In keeping with your

11 responsibilities as a staffing

12 coordinator, right, back at that time, how

13 would something like that occur? If there

14 was outreach from her to staff an

15 associate on something, how would you

16 become aware of it, was there some

17 mechanism involved? Was there a policy,

18 was there an expectation by you, how would

19 that develop that you had any knowledge or

20 would you just not be told?

21 A. No, I think she would probably

22 reach out. I think she probably would

23 have reached out to I guess it would have

24 been Brian Wolfe and me at the time, but

25 I'm not sure and I just don't recall.

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1 BIRNBAUM

2 Q. On or around September or October

3 of 2016, were you aware that Mr. Cardwell

4 and Rocio Clausen had a meeting on or

5 around September 8, 2016?

6 A. No, I was not aware of that.

7 Q. So it is your testimony you're

8 not aware of any meeting between Rocio

9 Clausen and Mr. Cardwell on September 8,

10 2016, in October of 2016, that meeting

11 occurred without you having any knowledge

12 of it?

13 A. I'm sorry, when? September or

14 October?

15 Q. So are you aware -- or going back

16 to October of 2016, were you aware that

17 Rocio Clausen and Mr. Cardwell had a

18 meeting on September 8, 2016?

19 A. No, I don't think I was aware of

20 that.

21 Q. Ms. Clausen was a manager in the

22 associate development department at that

23 time; correct?

24 A. As I recall she was in, maybe it

25 was the associate development group or

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1 BIRNBAUM

2 professional development. I don't know if

3 she was a manager or not but she had a

4 similar role to Carolina but in a

5 different group, not the M&A group.

6 Q. Did you have any conversations

7 with Ms. Clausen about her meeting with

8 Kaloma Cardwell at any time?

9 A. At any time?

10 Q. Yes.

11 A. No, not that I recall.

12 Q. Did you have any have any

13 conversation with Rocio Clausen about her

14 meeting with Mr. Cardwell in September at

15 all?

16 A. I don't think so.

17 Q. Is it possible that such -- that

18 information or the fact that a meeting

19 like that occurred was brought to your

20 attention?

21 MR. BIRENBOIM: Objection, calls

22 for speculation. You can answer.

23 THE WITNESS: I don't think it

24 happened. I didn't routinely have

25 meetings with her. I think I would

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1 BIRNBAUM

2 have remembered it and I don't

3 remember it.

4 BY MR. JEFFRIES:

5 Q. So I'm not asking about whether

6 you had the meeting. To be clear I'm

7 asking whether you were informed by Rocio

8 Clausen about a meeting that she had with

9 Mr. Cardwell.

10 A. I don't recall.

11 Q. Were you informed by anyone else

12 within the associate development

13 department about a meeting between Rocio

14 Clausen and Kaloma Cardwell?

15 A. I don't think so.

16 Q. Were you informed by anyone about

17 a meeting between Rocio Clausen and Kaloma

18 Cardwell in September of 2016 or at any

19 other period of time when you would have

20 been responsible for his staffing?

21 A. I don't recall.

22 **REDACTED**

REDACTED

REDACTED

REDACTED

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1 BIRNBAUM - CONFIDENTIAL
 2 REDACTED
 3 REDACTED
 4 REDACTED
 5 Q. During September of 2016, would
 6 Rocio Clausen have been someone who
 7 reported to you?
 8 A. No.
 9 Q. What was her position at that
 10 time?
 11 A. I told you what I know of her
 12 position.
 13 Q. What was that?
 14 A. She was in either associate
 15 development or professional development.
 16 It's possible we called it associate
 17 development at that time and I don't know
 18 what her title was in that group. And she
 19 primarily worked with other groups, not
 20 M&A.
 21 Q. So you were not aware of her
 22 specific title and your testimony is she
 23 didn't report to you. She wouldn't even
 24 report to you when staffing an M&A
 25 associate at that time?

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1 BIRNBAUM - CONFIDENTIAL
 2 A. No.
 3 Q. So it's your testimony that
 4 Ms. Clausen would be able to staff an M&A
 5 associate without consulting with you or
 6 informing you of the decision; is that
 7 your testimony?
 8 A. No, I didn't say that.
 9 Q. Well, what would be the case if
 10 Rocio Clausen was to staff an M&A
 11 associate that is subject to your staffing
 12 directives, what would the policy be or
 13 what would the routine be in terms of
 14 informing you of the decision or of the
 15 actions she was taking?
 16 MR. BIRENBOIM: Objection to
 17 form. You can answer.
 18 THE WITNESS: I just don't
 19 remember the details of this
 20 particular staffing arrangement. But
 21 I can tell you that in general, this
 22 kind of thing happened from time to
 23 time, right, yes, Mr. Cardwell was in
 24 M&A. But sometimes when other groups
 25 are really busy, we're asked to help

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1 BIRNBAUM - CONFIDENTIAL
 2 out and pitch in and we try to do so
 3 when we can. And in those
 4 circumstances the way that it
 5 generally works is -- I think her CO
 6 was working with the credit group at
 7 the time if I remember correctly. I
 8 think she probably would have reached
 9 out to Carolina in the first instance.
 10 It was sort of our counterpart in M&A,
 11 I believe, and I think we probably
 12 would have spoken with Carolina. So
 13 it's consistent that I would have had
 14 direct interactions with her CO, but
 15 there would have been some form of
 16 checking and permission so on. That's
 17 generally how it worked but I don't
 18 remember how it worked in this
 19 specific instance.
 20 BY MR. JEFFRIES:
 21 Q. Okay. And so I'm just trying to
 22 understand what the normal procedure would
 23 be. I'm trying to understand what the
 24 level of input that you would have in a
 25 decision like that, in a scenario such as

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1 BIRNBAUM - CONFIDENTIAL
 2 that where there's a cross-departmental
 3 designation.
 4 A. I just described it. That's the
 5 input I would have had.
 6 Q. Being made aware at some point by
 7 Carolina Fenner, who you indicated would
 8 have been communicated with by Rocio
 9 Clausen; is that correct?
 10 A. Generally, my co-staffing partner
 11 and I would have input and we would be
 12 able to weigh in on whether or that made
 13 sense or not. Again, I don't remember this
 14 specific instance but in general that's
 15 how it would work.
 16 Q. Do you recall Mr. Cardwell being
 17 described as someone who refused a
 18 cross-department assignment?
 19 A. No.
 20 Q. In your conversations with
 21 Ms. Clausen -- or do you have any
 22 recollection of any conversation with
 23 Rocio Clausen in which it was indicated
 24 that Mr. Cardwell had questioned being
 25 staffed on a credit assignment -- had

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1 BIRNBAUM - CONFIDENTIAL

2 from conversations with counsel.

3 Otherwise you can answer.

4 THE WITNESS: Not that I recall.

5 BY MR. JEFFRIES:

6 Q. As you sit here today, you are

7 aware of the allegation; correct?

8 A. No.

9 Q. So is this the first time? Is it

10 your testimony this is the first time that

11 you have heard in any fashion that

12 Mr. Cardwell made a complaint about the

13 firm's relationship with a client known as

14 REDACTED? Is your testimony that you're

15 learning about that for the first time

16 today?

17 A. I don't remember hearing that

18 before now.

19 Q. You say you don't recall hearing

20 that before now. What had you heard about

21 that -- about any conversation or

22 allegations with respect to Mr. Cardwell

23 making a complaint about the firm's

24 continued relationship with REDACTED

25 prior to today, is this the first time

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1 BIRNBAUM - CONFIDENTIAL

2 you're hearing about that?

3 A. Yes, as far as I can remember.

4 Q. Today, right now?

5 A. Yes.

6 Q. On or around March 21, 2017, were

7 you aware that Mr. Cardwell had asked the

8 firm if he could review his personnel file

9 and performance reviews?

10 A. No, I was not aware.

11 Q. Were you aware that he made that

12 request on any date range while he was

13 employed?

14 A. No, excluding discussions with

15 counsel.

16 Q. So it's your testimony that

17 prior -- it's your testimony that

18 excluding discussions with counsel, during

19 the period of time when Mr. Cardwell was

20 employed by Davis Polk, you were not aware

21 of any discussions related to his attempt

22 to view his personnel file and performance

23 reviews, is that your testimony?

24 A. Yes, I was not aware of any

25 attempt he made in that regard.

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1 BIRNBAUM

2 REDACTED

3 REDACTED

4 REDACTED

5 REDACTED

6 Q. Were you ever made aware that

7 Mr. Cardwell had a meeting with Thomas

8 Reid and Len Kreynin on or around March

9 29, 2017?

10 MR. BIRENBOIM: Same caution but

11 you can answer.

12 THE WITNESS: I don't think so.

13 BY MR. JEFFRIES:

14 Q. While Mr. Cardwell was employed

15 as an associate at Davis Polk, were you

16 ever told that Mr. Cardwell had met with

17 the managing partner about staffing and

18 performance reviews?

19 A. No.

20 Q. Prior to your testimony today,

21 and without getting into the details of

22 any conversation with counsel, did you

23 have an awareness of the fact that

24 Mr. Cardwell had met with Thomas Reid and

25 Len Kreynin about performance reviews

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1 BIRNBAUM

2 prior to him being terminated?

3 A. No, no I don't.

4 Q. For the period between October

5 2016 and April 2017, what was your

6 involvement in Cardwell's employment?

7 A. I don't understand the question.

8 Q. Well, what role did you play, did

9 you play -- would you have been the

10 staffing coordinator throughout that time?

11 Between October 2016 and April 2017, would

12 you have been --

13 A. Yes.

14 Q. -- responsible for staffing

15 Mr. Cardwell?

16 A. Yes, I was one of the staffing

17 partners through that period. That would

18 have been my principal role with respect

19 to Mr. Cardwell.

20 Q. Did you have any conversations

21 about Mr. Cardwell during that period of

22 time?

23 MR. BIRENBOIM: Objection to

24 form. With anyone at any time in that

25 period?

<p style="text-align: right;">Page 190</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 BY MR. JEFFRIES:</p> <p>3 Q. Did you have any conversations</p> <p>4 about Mr. Cardwell with any -- did you</p> <p>5 have any conversations about Mr. Cardwell</p> <p>6 and about staffing Mr. Cardwell with Brian</p> <p>7 Wolfe during October 2016 through April</p> <p>8 2017?</p> <p>9 A. I would have had. I don't</p> <p>10 remember any specific conversations. I do</p> <p>11 remember in general trying through that</p> <p>12 period to staff Mr. Cardwell on deals and</p> <p>13 I would have discussed those deals with</p> <p>14 the partners who came to Mr. Wolfe and me</p> <p>15 for staffing. I would have discussed with</p> <p>16 Mr. Wolfe and I would have been trying as</p> <p>17 I had been to find suitable deals that</p> <p>18 Mr. Cardwell could execute, but it was</p> <p>19 just very difficult because of his</p> <p>20 performance. But I would have been having</p> <p>21 indications like that just in the ordinary</p> <p>22 course of my staffing partner role.</p> <p>23 Q. In what form would those</p> <p>24 conversations have taken place? Would you</p> <p>25 have e-mailed about it, would you have</p>	<p style="text-align: right;">Page 192</p> <p>1 BIRNBAUM</p> <p>2 REDACTED</p> <p>3 THE WITNESS: Can I just ask for</p> <p>4 a quick? Zach, our concierge, could</p> <p>5 you maybe return my controls over my</p> <p>6 screen just so I can mute people when</p> <p>7 I cough and spare people that?</p> <p>8 VERITEXT CONCIERGE: Yeah, you</p> <p>9 should be there. I took control back.</p> <p>10 BY MR. JEFFRIES:</p> <p>11 Q. So you never heard about -- you</p> <p>12 never heard about any e-mail from</p> <p>13 Mr. Cardwell to Mr. Goldberg about how his</p> <p>14 experiences at Davis Polk were making him</p> <p>15 physically ill at all prior to today?</p> <p>16 A. Not that I recall.</p> <p>17 Q. You're saying not that you</p> <p>18 recall. We're talking about an associate,</p> <p>19 Black associate having a conversation with</p> <p>20 a partner about being made physically ill</p> <p>21 by virtue of his experience at Davis Polk.</p> <p>22 Is your testimony truly that you</p> <p>23 don't recall whether or not such</p> <p>24 information was made known to you prior to</p> <p>25 today, is that something you would forget</p>
<p style="text-align: right;">Page 191</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 just talked to people?</p> <p>3 A. In general, it was a combination,</p> <p>4 e-mails, phone calls, stopping by people's</p> <p>5 offices.</p> <p>6 Q. Who did you have those</p> <p>7 conversations or interactions with?</p> <p>8 A. I don't remember specifics.</p> <p>9 Q. Do you remember anyone</p> <p>10 individually?</p> <p>11 A. No. No, certainly not with</p> <p>12 respect to that period and they just --</p> <p>13 this was just so ordinary course for me as</p> <p>14 a staffing partner. No one instance</p> <p>15 sticks in my memory.</p> <p>16 Q. Are you aware that Mr. Cardwell</p> <p>17 e-mailed Louis Goldberg on or around May</p> <p>18 22, 2017 and described how his experiences</p> <p>19 at Davis Polk had made him physically ill?</p> <p>20 A. No.</p> <p>21 REDACTED</p> <p>REDACTED</p> <p>REDACTED</p> <p>REDACTED</p> <p>REDACTED</p>	<p style="text-align: right;">Page 193</p> <p>1 BIRNBAUM</p> <p>2 in your capacity as a staffing</p> <p>3 coordinator?</p> <p>4 A. I don't think I was aware of it.</p> <p>5 Q. So is it safe to say that the</p> <p>6 only thing that you remember about</p> <p>7 Mr. Cardwell is your belief that he was a</p> <p>8 poor performer?</p> <p>9 A. Sorry, I don't understand, the</p> <p>10 only thing ever under any circumstances?</p> <p>11 Q. Well, I've asked you if you</p> <p>12 recalled -- I had asked you if you heard</p> <p>13 of a meeting between Mr. Cardwell and</p> <p>14 Rocio Clausen with respect to his</p> <p>15 complaint about being staffed on certain</p> <p>16 assignments due to his race and your</p> <p>17 answer was you don't recall.</p> <p>18 Do you remember that? Just a few</p> <p>19 minutes ago.</p> <p>20 A. Yes.</p> <p>21 Q. And I asked you whether or not</p> <p>22 you had any recollection or any</p> <p>23 information rather about a conversation</p> <p>24 between Louis Goldberg and Mr. Cardwell</p> <p>25 prior to his -- Louis Goldberg,</p>

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1 BIRNBAUM
 2 Mr. Cardwell and Mr. Reid prior to his
 3 termination and you said you don't recall.
 4 Do you remember saying that?
 5 A. I remember the discussion we've
 6 had over the last few minutes, yes.
 7 Q. Yet the one thing that you do
 8 remember and have consistently maintained
 9 that you remember is the fact that this
 10 associate, Mr. Cardwell, who made a
 11 complaint of discrimination against Davis
 12 Polk while he was employed there, was a
 13 poor performer, that you remember?
 14 A. Well, a couple things about that.
 15 I wasn't aware he made a complaint while
 16 employed.
 17 Q. As you sit here today you're
 18 aware of it?
 19 REDACTED
 20 REDACTED
 21 REDACTED
 22 REDACTED
 23 REDACTED
 24 REDACTED
 25 REDACTED

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1 BIRNBAUM
 2 REDACTED
 3 REDACTED
 4 REDACTED
 5 REDACTED
 6 REDACTED
 7 REDACTED
 8 REDACTED
 9 REDACTED
 10 REDACTED
 11 REDACTED
 12 Q. Would you say that was out of the
 13 ordinary, the difficulty you had in
 14 staffing him?
 15 A. At any given time there are
 16 always lower performing associates. He
 17 was a very poor performer. You know,
 18 there was the difference of degree. There
 19 were others who it was hard to staff, too,
 20 but he was just very, very hard to staff.
 21 Q. What made him a very, very hard
 22 to staff poor performer?
 23 A. What were his performance issues?
 24 Q. Yes.
 25 REDACTED

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1 BIRNBAUM
 2 REDACTED
 3 REDACTED
 4 REDACTED
 5 REDACTED
 6 REDACTED
 7 REDACTED
 8 REDACTED
 9 Q. And who communicated these issues
 10 to you?
 11 A. I don't remember specifically but
 12 these were -- these were the issues and
 13 those were his -- that was his general
 14 reputation at the time I had
 15 responsibility for staffing.
 16 Q. So you don't remember any of the
 17 people you may have spoken to but you
 18 remember five specific issues that plagued
 19 Mr. Cardwell in your recitation of these
 20 facts as you sit here today. But do you
 21 don't remember who you spoke to to try to
 22 get him staffed, you don't remember any of
 23 the deals you tried to get him staffed on,
 24 you don't remember any of the people you
 25 reached out to in this laborious task to

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1 BIRNBAUM
 2 get him staffed but you remember the
 3 issues he had; is that correct?
 4 A. Yes, I mean as I said, this was
 5 five years ago, I was working to staff him
 6 and 50 other associates. I don't remember
 7 the specifics. I do remember the general
 8 performance issues.
 9 Q. Did you have any conversations
 10 with Mr. Goldberg about him meeting with
 11 Mr. Cardwell and Mr. Reid at any point
 12 prior to today?
 13 A. I don't think so.
 14 Q. Is it a possibility?
 15 MR. BIRENBOIM: Objection to
 16 form, calls for speculation.
 17 THE WITNESS: No, I don't
 18 remember any such conversation.
 19 BY MR. JEFFRIES:
 20 Q. Do you have any reason to believe
 21 that there were any specific complaints
 22 made by Mr. Cardwell about any specific
 23 M&A partners during the meeting between
 24 yourself and Mr. Goldberg and Mr. Reid?
 25 Do you have any information or any reason

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1 BIRNBAUM - CONFIDENTIAL

2 MR. BIRENBOIM: Objection to the

3 form.

4 THE WITNESS: I don't recall.

5 BY MR. JEFFRIES:

6 Q. Did you ever hear that someone --

7 that members of the firm are interested in

8 Mr. Cardwell working somewhere other than

9 Davis Polk?

10 A. I don't remember.

11 Q. Did you ever have any

12 conversations with any other partners at

13 Davis Polk about their desire that

14 Mr. Cardwell work somewhere other than

15 Davis Polk?

16 A. What do you mean desire that he

17 work somewhere other than Davis Polk?

18 Q. Did you hear from any of the

19 partners, did any of the partners prior to

20 his termination express to you their

21 belief that he should not be working at

22 Davis Polk?

23 MR. BIRENBOIM: Objection to

24 form. You can answer.

25 THE WITNESS: I'm not sure I know

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1 BIRNBAUM - CONFIDENTIAL

2 how to answer that question.

3 BY MR. JEFFRIES:

4 **REDACTED**

5 **REDACTED**

6 **REDACTED**

7 **REDACTED**

8 **REDACTED**

9 **REDACTED**

10 **REDACTED**

11 **REDACTED**

12 **REDACTED**

13 Q. Who did you speak to about that?

14 A. I've answered that question as

15 best I can repeatedly. I don't remember

16 specific -- I don't remember specific

17 discussions with specific partners.

18 Q. So you can't tell me anybody that

19 you've had these conversations about him

20 being such a poor performer?

21 A. As I've said, no, I have a strong

22 general impression from the time but I

23 can't remember specific conversations with

24 specific people.

25 Q. Who made the decision to

Page 268

1 BIRNBAUM - CONFIDENTIAL

2 terminate Mr. Cardwell?

3 MR. BIRENBOIM: Objection to

4 form.

5 THE WITNESS: What do you mean?

6 BY MR. JEFFRIES:

7 Q. Who made the decision to end

8 Mr. Cardwell's employment at Davis Polk?

9 MR. BIRENBOIM: Objection to

10 form. You can answer.

11 THE WITNESS: I'm not sure -- I'm

12 not sure.

13 BY MR. JEFFRIES:

14 Q. Do you know who it was that

15 decided that he should be terminated due

16 to performance?

17 A. No.

18 **REDACTED**

19 **REDACTED**

20 **REDACTED**

21 **REDACTED**

22 **REDACTED**

23 **REDACTED**

24 **REDACTED**

25 **REDACTED**

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1 BIRNBAUM - CONFIDENTIAL

2 **REDACTED**

3 Q. And when were you asked to

4 provide that input?

5 A. I don't remember.

6 Q. Who asked you to provide that

7 input?

8 A. I don't remember. I think it was

9 group leadership but I don't remember. I

10 think one of the -- I think one of the

11 co-heads of our group but I don't remember

12 who or when.

13 Q. Do you remember if it was John

14 Bick?

15 A. I don't remember.

16 Q. Who else could it have been? You

17 said one of the co-heads. Who else could

18 it have been at that point in time that

19 would have asked you for your input on

20 that issue?

21 A. I don't remember exactly when

22 this was but as I mentioned before, I

23 think Mr. Goldberg was co-head at one

24 point in time. It may have been him. I

25 don't recall.

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1 BIRNBAUM - CONFIDENTIAL

2 Q. Do you know if this was a

3 conversation that you were requested to

4 give input on in 2016?

5 A. I don't think it was that early,

6 no. I mean I would have been asked for

7 input on Mr. Cardwell just as part of my

8 staffing duties but I don't think I was

9 asked for input in connection with a

10 potential decision to terminate him that

11 early.

12 Q. What is the earliest that you

13 recall being asked to give input or weigh

14 in on the decision to terminate

15 Mr. Cardwell?

16 A. I don't remember.

17 Q. Do you recall whether that

18 request for input was in connection with a

19 performance review cycle?

20 A. It may have been, I don't

21 remember.

22 Q. Was it in 2018?

23 A. I don't recall. I think it may

24 have been but I don't recall specifically.

25 Q. Was it in 2017?

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1 BIRNBAUM - CONFIDENTIAL

2 A. I don't think so. It sounds

3 early, too, but I don't recall.

4 Q. How was the conversation carried

5 out in which you gave input?

6 A. I don't remember.

7 Q. Was the conversation unusual in

8 any way?

9 A. I don't remember it being so, no.

10 Q. Do you remember where you were?

11 A. No.

12 Q. Do you remember whether it was

13 face to face?

14 A. I don't remember.

15 Q. Do you remember whether there

16 were other people involved in the

17 conversation?

18 A. No, I don't recall.

19 Q. Do you remember if it was on the

20 phone?

21 A. I don't recall.

22 Q. Do you remember if it was through

23 e-mail?

24 A. I don't recall.

25 Q. Do you remember how many

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1 BIRNBAUM - CONFIDENTIAL

2 conversations there were about this?

3 A. No.

4 Q. Do you remember how many people

5 were involved in the conversation about

6 the decision to terminate Mr. Cardwell?

7 A. No.

8 Q. Do you remember if you had this

9 conversation -- do you remember if Tom

10 Reid was a part of this conversation that

11 you had?

12 A. I don't remember.

13 Q. Do you remember if John Bick was

14 a part of the conversation that you had?

15 A. No, I don't.

16 Q. Do you remember if Sophia Hudson

17 was a part of the conversation that you

18 had?

19 A. No, she wasn't part of any

20 conversation like this.

21 Q. Do you remember if Daniel Brass

22 was a part of the conversation you had?

23 A. I don't recall.

24 Q. Do you remember if Brian Wolfe

25 was a part of the conversations you had?

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1 BIRNBAUM - CONFIDENTIAL

2 A. I don't think so.

3 Q. Do you know if Brian Wolfe had

4 any of his own conversations about whether

5 or not Mr. Cardwell should be terminated

6 for performance?

7 A. I don't know.

8 Q. Did he communicate to you that he

9 had been asked for input about whether or

10 not Mr. Cardwell should be terminated for

11 poor performance?

12 A. No, I don't think so.

13 **REDACTED**

14 **REDACTED**

15 **REDACTED**

16 **REDACTED**

17 **REDACTED**.

18 Q. How many terminations have you

19 participated in as of today, since making

20 partner?

21 MR. BIRENBOIM: Objection to

22 form.

23 THE WITNESS: I'm not sure I

24 understand the specific context here.

25 What's the question?

<p style="text-align: right;">Page 274</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 BY MR. JEFFRIES:</p> <p>3 Q. How many terminations of</p> <p>4 associates have you been involved in in</p> <p>5 any context since making partner?</p> <p>6 A. I would -- I think if -- I think</p> <p>7 I'd say low single digits. I don't</p> <p>8 remember specifically.</p> <p>9 Q. And yet as you sit here today,</p> <p>10 you can't remember who you as a partner</p> <p>11 and since becoming a partner would have</p> <p>12 had conversations with about terminating</p> <p>13 Mr. Cardwell, a Black associate who made a</p> <p>14 claim of discrimination against Davis</p> <p>15 Polk, you can't remember who you would</p> <p>16 have had a conversation with about a</p> <p>17 decision like that?</p> <p>18 MR. BIRENBOIM: Objection to</p> <p>19 form, no foundation in view of those</p> <p>20 things. Go ahead.</p> <p>21 THE WITNESS: I didn't know those</p> <p>22 things.</p> <p>23 BY MR. JEFFRIES:</p> <p>24 [REDACTED]</p> <p>25 [REDACTED]</p>	<p style="text-align: right;">Page 276</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 THE WITNESS: Yeah, there's -- in</p> <p>3 my experience, there's, you know, we</p> <p>4 want our associates to succeed and to</p> <p>5 turn things around and there's often</p> <p>6 as part of reviews, you know,</p> <p>7 constructive feedback, things to work</p> <p>8 on to, you know, try to do better in</p> <p>9 the future in the hope that the</p> <p>10 associate can turn it around. And so</p> <p>11 there's that to process of an</p> <p>12 opportunity to improve, so that's part</p> <p>13 of the review process that generally</p> <p>14 precedes termination.</p> <p>15 BY MR. JEFFRIES:</p> <p>16 Q. So let's just get back to the</p> <p>17 point of your testimony with respect to</p> <p>18 when you first received notice of</p> <p>19 Mr. Cardwell's complaints of</p> <p>20 discrimination. Is it your testimony --</p> <p>21 did you receive any preservation notices</p> <p>22 in connection with any complaints that</p> <p>23 Kaloma Cardwell made about racial</p> <p>24 discrimination while employed at Davis</p> <p>25 Polk?</p>
<p style="text-align: right;">Page 275</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 [REDACTED]</p> <p>3 [REDACTED]</p> <p>4 [REDACTED]</p> <p>5 [REDACTED]</p> <p>6 THE WITNESS: I don't recall</p> <p>7 knowing I think prior to his filing a</p> <p>8 complaint in this litigation.</p> <p>9 BY MR. JEFFRIES:</p> <p>10 Q. What steps normally precede the</p> <p>11 firm terminating an associate for poor</p> <p>12 performance?</p> <p>13 A. In my experience, consistently</p> <p>14 poor performance on the associate's part</p> <p>15 and a decision at the group level by group</p> <p>16 leadership, potentially with management</p> <p>17 committee approval to terminate the</p> <p>18 associate in question. Those are the key</p> <p>19 elements in my experience.</p> <p>20 Q. In your experience are there any</p> <p>21 remediation plans that are set forth prior</p> <p>22 to terminating an associate for poor</p> <p>23 performance?</p> <p>24 MR. BIRENBOIM: Objection to</p> <p>25 form.</p>	<p style="text-align: right;">Page 277</p> <p>1 BIRNBAUM - CONFIDENTIAL</p> <p>2 A. Yes, I believe I did.</p> <p>3 Q. And what did you think they were</p> <p>4 about?</p> <p>5 MR. BIRENBOIM: Objection to</p> <p>6 form.</p> <p>7 THE WITNESS: I didn't know and I</p> <p>8 don't recall what I thought at the</p> <p>9 time.</p> <p>10 BY MR. JEFFRIES:</p> <p>11 Q. What did you do when you got</p> <p>12 them, who did you speak to?</p> <p>13 A. Other than counsel?</p> <p>14 Q. Yes.</p> <p>15 A. No one.</p> <p>16 Q. But you did speak to counsel;</p> <p>17 right? You received the preservation</p> <p>18 notices and you spoke to counsel; is that</p> <p>19 correct?</p> <p>20 MR. BIRENBOIM: Answer that yes</p> <p>21 or no.</p> <p>22 THE WITNESS: Yes.</p> <p>23 BY MR. JEFFRIES:</p> <p>24 Q. And so by virtue of the</p> <p>25 preservation notices and speaking to</p>

70 (Pages 274 - 277)

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BIRNBAUM

*** ERRATA SHEET ***

NAME OF CASE: Cardwell vs. Davis Polk

DATE OF DEPOSITION: April 12, 2021

WITNESS: Harold Birnbaum

PAGE	LINE	FROM	TO
36-37	25-3	"Is there any relationship...partnership."	This is a new question from Jeffries, not an answer by witness.

296	15	Exhibit 21	Exhibit 15
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296	20-21	Exhibit 21	Exhibit 15
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DocuSigned by:

Harold Birnbaum

D08FF3D34B0C486...

HAROLD BIRNBAUM

Witness and sworn to before me

this ____ day of _____, 2021.

(Notary Public)_____
My Commission Expires: